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SUPERVISORY LIABILITY POST-*IQBAL*: A "MISNOMER" INDEED

Desiree L. Grace[*]

I. INTRODUCTION

The Supreme Court's blockbuster decision in *Ashcroft v. Iqbal*[1] has generated enormous scholarly interest and, within just ten months of being decided, became the seventy-sixth most cited Supreme Court case of all time.[2] Yet, academic attention has focused primarily on whether the Court's imposition of a "plausibility" pleading standard substantially altered the traditionally liberal pleading standards of the Federal Rules of Civil Procedure.[3] Scholars have paid far less attention to another important—and potentially confusing—impact of the decision: whether it fundamentally changed the standards for alleging "supervisory liability" against high-level government officials.

As a result of some arguably broad language in the majority opinion, as well as suggestions by Justice Souter in his dissenting opinion, some courts have interpreted *Iqbal* as holding that supervisors are not liable for their mere "knowledge and acquiescence" in their subordinates' conduct, and that consequently, a plaintiff must plausibly allege that the supervisor himself personally engaged in the chal-

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[1] 129 S. Ct. 1937 (2009).

[2] Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1359 (2010) (noting that as of March 17, 2010, federal courts and tribunals had cited *Ashcroft v. Iqbal* 6,620 times).

[3] *E.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010); Edward A. Hartnett, *The Changing Shape of Federal Civil Pretrial Practice: Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473 (2010); Lee H. Rosenthal, *Pleading, for the Future: Conversations After* Iqbal, 114 PENN ST. L. REV. 1537 (2010); Steinman, *supra* note 2.

lenged conduct.[4] Such an interpretation would create a dramatic shift in the law of supervisory liability, as cases previously brought under 42 U.S.C. § 1983 have suggested that supervisors could be held liable upon proof of something short of personal direction or direct involvement.[5]

Other courts and some early commentators suggest a more restrained reading of *Iqbal*. This narrower interpretation suggests that *Iqbal*'s ruling should be limited to its facts: "knowledge and acquiescence" is insufficient to satisfy supervisory liability in situations where the substantive cause of action requires proof of discriminatory intent.[6] Fundamentally, this limited reading indicates that the requisite showing for a supervisory liability claim varies depending on the type of underlying constitutional violation alleged.

In this Comment, I seek to resolve the confusion among these competing interpretations, and offer a more coherent and durable

[4] *See* al-Kidd v. Ashcroft, 580 F.3d 949, 976 (9th Cir. 2009) (Kennedy, J., dissenting), *cert. granted*, 131 S. Ct. 415 (2010); Lewis v. Tripp, 604 F.3d 1221, 1227 n.3 (10th Cir. 2010).

[5] *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) (holding that local governing bodies can be liable where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers"); Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1182 (9th Cir. 2007) ("[A] supervisor is liable for the acts of his subordinates if the supervisor participated in or directed the violations, or knew of the violations [of subordinates] and failed to act to prevent them.") (internal citations omitted); Serna v. Colo. Dep't of Corr., 455 F.3d 1146, 1151 (10th Cir. 2006) ("[T]he plaintiff must establish a deliberate, intentional act by the supervisor to violate constitutional rights.") (internal citations omitted); Estate of Davis v. City of N. Richland Hills, 406 F.3d 375, 381 (5th Cir. 2005) (allowing supervisory liability for failure to train or supervise); Ottman v. City of Indep., 341 F.3d 751, 761 (8th Cir. 2003) (imposing liability "when the supervisor's corrective inaction constitutes deliberate indifference toward the violation"); Cottone v. Jenne, 326 F.3d 1352, 1360 (11th Cir. 2003) (stating that a supervisor may be liable upon a showing of "a history of widespread abuse [that] puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so"); Doe v. City of Roseville, 296 F.3d 431, 439 (6th Cir. 2002) (stating that in order to hold supervisory defendants liable, plaintiff must show that the defendants' conduct amounted to deliberate indifference or, put differently, "to a tacit authorization of the abuse"); Brown v. Muhlenberg Twp., 269 F.3d 205, 216 (3d Cir. 2001) (allowing supervisory liability on a failure to train claim when "the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights that the policymaker's failure to respond amounts to deliberate indifference"); O'Neill v. Baker, 210 F.3d 41, 47 (1st Cir. 2000) (holding that supervisory liability requires the plaintiff to "show that the supervisor possessed either the state of mind for the particular constitutional violation or deliberate indifference, and . . . played a causal role in plaintiff's constitutional deprivation") (internal citations omitted).

[6] *See, e.g.*, Starr v. Baca, No. 09-55233, 2011 U.S. App. LEXIS 15283, at *10–11 (9th Cir. July 25, 2011); Dodds v. Richardson, 614 F.3d 1185, 1204 (10th Cir. 2010).

theory of pleading supervisory liability. Part II of this Comment will discuss the *Iqbal* opinion and provide a general overview of the concept of supervisory liability and its relationship to the doctrine of qualified immunity. It will then consider the various interpretations of the *Iqbal* opinion and analyze the policy implications and practical considerations resulting from each approach. Next, based on both the language of the *Iqbal* opinion and the context in which the decision was made, Part III will conclude that the ruling on the scope of supervisory liability was limited and could not have categorically abolished the concept of supervisory liability. Finally, Part IV will analyze pre-*Iqbal* case law in conjunction with the *Iqbal* holding to suggest a clarified, two-prong standard. Specifically, prong one is a requisite personal involvement and prong two is a requisite mental state associated with the particular cause of action asserted.

In sum, this Comment will argue that the *Iqbal* decision did not alter the requirement that government officials must be personally involved; it simply reiterated this requirement by stating that officials are only liable "for their own misconduct."[7] Additionally, this Comment concludes that the decision *did* alter the obligation to plead facts relevant to the state-of-mind required for the particular cause of action. Knowledge of a subordinate's misconduct and an unreasonable or reckless reaction to that misconduct will no longer be sufficient in *every* situation. Rather, the official's mental state will vary, as it must reflect the level of intent required by the underlying violation.

II. *IQBAL*, QUALIFIED IMMUNITY, AND CONFUSION OVER STANDARDS OF SUPERVISORY LIABILITY

A. *The* Iqbal *Decision*.

As noted, attorneys and scholars cite *Ashcroft v. Iqbal* primarily for its language pertaining to pleading standards.[8] *Iqbal* involved a *Bivens*[9] action against several high-level federal officials, including the former Attorney General of the United States and the former Director of the Federal Bureau of Investigation (FBI).[10] A central dispute

[7] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

[8] *See, e.g.*, Bone, *supra* note 3; Rosenthal, *supra* note 3.

[9] A *Bivens* action is the federal analog to a claim under 42 U.S.C. § 1983. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971); *see infra* text accompanying notes 21–26. Section 1983 gives plaintiffs the right to sue state government officials in their individual capacity for their official actions. 42 U.S.C. § 1983 (2006). *Bivens* creates a parallel cause of action for claims against federal officials. *Bivens*, 403 U.S. 388.

[10] *Iqbal*, 129 S. Ct. at 1942.

in *Iqbal* pertained to the standard for supervisory liability.[11] Supervisory liability centers on instances where courts hold high-level government officials liable for their subordinates' actions. The law is clear that there is no respondeat superior liability,[12] but the law is unclear as to the point at which supervisors assume responsibility.[13]

Javaid Iqbal was a Muslim, Pakistani citizen arrested in the United States on November 2, 2001—shortly after the September 11, 2001 terrorist attacks—on criminal charges of conspiracy to defraud the United States and fraud with identification.[14] After approximately two months of incarceration at the Metropolitan Detention Center in Brooklyn (MDC), Iqbal was moved from general population[15] to the Administrative Maximum Special Housing Unit as a result of being designated a person "of high interest" in the September 11th investigations.[16] Iqbal alleged that he was deprived of various constitutional protections, including his First and Fifth Amendment rights, and brought suit against an extensive list of defendants.[17] Specifically, Iqbal brought the action against members of the MDC staff,[18] officials from the Bureau of Prisons (BOP), officials from the FBI, and the Attorney General.[19]

In his suit against these high-level officials, Iqbal alleged that the FBI arrested and detained thousands of Muslims during the September 11th investigations, and that many of these arrestees and detainees were classified as "high interest" solely on the basis of their race, religion, or national origin.[20] A designation "of high interest" allegedly had a direct effect on the duration and conditions of an arres-

[11] *See id.*

[12] Respondeat superior is "the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." BLACK'S LAW DICTIONARY 1338 (8th ed. 2008).

[13] *Iqbal*, 129 S. Ct. at 1948.

[14] Iqbal v. Hasty, 490 F.3d 143, 148 n.1 (2d Cir. 2007).

[15] "General population" refers to the environment in prison where a prisoner has access to other inmates. *See* Julia Dahl, *Is It Time to Ban Solitary Confinement?*, CRIME REP. (Oct. 12, 2009), http://thecrimereport.org/2009/10/12/is-it-time-to-ban-solitary-confinement/#. Contrast this to solitary confinement where a prisoner is kept in isolation from other prisoners and is locked in his or her cell for up to twenty-three hours per day. *Id.*

[16] *Iqbal*, 490 F.3d at 148.

[17] *Id.* at 147.

[18] Dennis Hasty, the first named defendant, was the former warden of the MDC where Iqbal was detained.

[19] *Iqbal*, 490 F.3d at 147.

[20] *Id.* at 148.

tee's detention.[21] The Supreme Court's decision dealt only with petitioners John Ashcroft, the Attorney General of the United States at the time of Iqbal's arrest and detention, and Robert Mueller, the then-Director of the FBI.[22] Iqbal claimed that these defendants implemented an unconstitutional policy that caused him to endure harsh conditions of confinement solely because of his race, religion, or national origin.[23] Iqbal asserted that "Ashcroft was the policy's 'principal architect' and Mueller was 'instrumental' in its adoption and execution."[24]

The United States District Court for the Eastern District of New York denied Ashcroft and Mueller's motion to dismiss Iqbal's discrimination claim based on a defense of qualified immunity, and the court of appeals affirmed.[25] Ashcroft and Mueller petitioned for certiorari to the Supreme Court seeking clarification of their personal liability for constitutional violations that their subordinates allegedly caused.[26]

Iqbal brought his claims as a *Bivens* action.[27] *Bivens* claims are the federal analog to 42 U.S.C. § 1983 claims, which are brought under state law.[28] A § 1983 action is a claim for damages against a state government official in his or her individual capacity for alleged violations of constitutional rights.[29] The language of 42 U.S.C. § 1983 states:

> Every person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[30]

A *Bivens* action, then, is a claim for damages against *federal* officials in their individual capacity for alleged violations of constitution-

[21] *Id.*
[22] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1944 (2009).
[23] First Amended Complaint and Jury Demand at 13:69, Elmaghraby v. Ashcroft, No. 04-CV-1809, 2005 U.S. Dist. LEXIS 21434 (E.D.N.Y. Sept. 27, 2005), ECF No. 35 [hereinafter Elmaghraby First Amended Complaint].
[24] *Iqbal*, 129 S. Ct. at 1939.
[25] *Elmaghraby*, 2005 U.S. Dist. LEXIS 21434, at *114.
[26] Petition for Writ of Certiorari at 29, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (No. 07-1015).
[27] *Iqbal*, 129 S. Ct. at 1943.
[28] *See* 42 U.S.C. § 1983 (2006).
[29] *Id.*
[30] *Id.*

al rights.[31] Neither a § 1983 claim nor a *Bivens* action can succeed on a theory of vicarious liability; the Supreme Court has rejected a theory of respondeat superior to hold government officials liable.[32] As a result, the majority opinion in *Iqbal* concluded that "[a] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."[33] The Court explained that the requisite showing for a *Bivens* violation "will vary with the constitutional provision at issue."[34] Therefore, as an example, an analysis of a Fourth Amendment violation should differ from that of an Eighth Amendment violation. In *Iqbal*, the alleged constitutional violations were those of the First and Fifth Amendments.[35] In an effort to clarify the ruling regarding the volatility of *Bivens* analyses and to apply the *Bivens* standard to the *Iqbal* facts, the Supreme Court specified that "[w]here the claim is invidious discrimination in contravention of the *First* and *Fifth Amendments*, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose."[36]

B. Basic Principles of Supervisory Liability and Qualified Immunity

The doctrine of supervisory liability is relevant in the public sector in situations in which an individual suffers a violation of a constitutionally protected right and seeks to hold those government officials who are responsible for the violation personally liable.[37] The law is clear that there is no respondeat superior in the context of supervisory liability,[38] but jurisdictions are split as to when liability attaches to a supervisor.[39] Supervisory liability exists in order to provide high-

[31] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66–67 (2001) (citing Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 389 (1971)).

[32] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

[33] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009).

[34] *Id.*

[35] Elmaghraby First Amended Complaint, *supra* note 23.

[36] *Iqbal*, 129 S. Ct. at 1948 (emphasis added).

[37] *See generally* Sheldon Nahmod, *Pondering* Iqbal*: Constitutional Torts, Over-Deterrence and Supervisory Liability After* Iqbal, 14 LEWIS & CLARK L. REV. 279 (2010) (explaining the basic foundation of supervisory liability, arguing that the *Iqbal* decision was the result of the Court's increasing concern with over-deterrence, and advocating for the constitutional approach for *Bivens* and § 1983 cases).

[38] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

[39] *See, e.g.*, Allen v. Heinzle, 351 F. App'x 145, 146 (7th Cir. 2009) (requiring control over the situation and deliberate indifference); Nelson v. Corr. Med. Servs., 583 F.3d 522, 538 (7th Cir. 2009) (indicating that liability would be permissible for promulgating a policy that required or encouraged the violation of inmates' rights); Sanchez v. Pereira-Castillo, 590 F.3d 31, 49 (1st Cir. 2009) (explaining that, in some

level officials with the incentive to prevent and eliminate misconduct by their subordinates.[40] Likewise, it provides a means of compensation for the victims of misconduct.[41]

While, in some circumstances, tort law recognizes that supervisors may be held vicariously liable for their subordinates' conduct,[42] courts have long held that it does not make sense to extend vicarious liability to government employment situations.[43] This stems from the need for government officials to perform their duties without the distraction of potential liability.[44] Because of this preference for permitting government officials to make sweeping policy decisions without fear of personal liability, the doctrine of qualified immunity exists as another measure of protection.[45]

When supervisory officials are sued under a § 1983 or *Bivens* action, they will commonly assert the qualified immunity defense.[46] A claim of qualified immunity is essentially an argument that, despite the existence of a constitutional violation, the government official should not be held liable in his or her individual capacity for that violation because he or she was acting reasonably and pursuant to his

circumstances, liability is permissible for failure to train, supervise, or hire appropriately).

[40] *See generally* Kit Kinports, Iqbal *and Supervisory Immunity*, 114 PENN ST. L. REV. 1291 (2010).

[41] *Id.*

[42] W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS §§ 69–70, at 499–505 (5th ed. 1984) (citing Talbot Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222 (1940)) (stating that a supervisor's "vicarious liability, for conduct which is in no way his own, extends to any and all tortious conduct of the servant which is within the 'scope of the employment'" and subsequently explaining the circumstances that fall within the "scope of employment" ambit).

[43] *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

[44] George D. Brown, *Counter-Counter-Terrorism Via Lawsuit—The* Bivens *Impasse*, 82 S. CAL. L. REV. 841, 876 (2009) ("Immunity protects the official from the burden of litigation and also furthers the government's interest in having zealous officials."); *see also* Kinports, *supra* note 40, at 1295.

[45] Nahmod, *supra* note 37, at 286.

[46] *Id.*; Brown, *supra* note 44, at 875 (asserting that the qualified immunity defense is one of the two most prominent defenses); Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 812 (2010) (suggesting that the lack of success of *Bivens* litigation is due, in part, to the fact that "*Bivens* plaintiffs are disadvantaged because the personal defense of qualified immunity is an imposing barrier to recovery from federal officers") (internal citations omitted); William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1143 (1996) ("Since the 1980s, it has become very difficult for plaintiffs . . . to win a *Bivens* case."); *see also id.* at 1152, 1164–65.

or her official role.[47] The purpose of the qualified immunity defense is to "shield [government officials] from undue interference with their duties and from potentially disabling threats of liability."[48] As a result, the Court has said that "high officials require greater protection than those with less complex discretionary responsibilities."[49] One prominent benefit of this defense is that qualified immunity is a shield from the burdens of discovery and the costs of litigation, not just a shield from liability.[50]

Assessing the defense of qualified immunity typically requires a bifurcated inquiry.[51] The first part of the inquiry is whether a constitutional violation has actually occurred.[52] Second, upon finding that a constitutional violation has occurred, the court must then determine whether the violated constitutional right was "clearly established" at the time of the government official's misconduct.[53] Prior to 2009, district courts were required to address these questions in this order.[54] This meant that there could be a threshold finding of a constitutional violation, even if the official could not be held liable.[55] In *Pearson v. Callahan*, the Supreme Court concluded that district courts can choose to conduct the qualified immunity analysis in any order they wish.[56] So, if a court finds it easier to rule that the right was not clearly established, it can do so without ruling on whether a constitutional violation actually occurred.[57] Conversely, even if the court finds that there was a constitutional violation, the government defendant is still entitled to qualified immunity if the right was not "clearly established" at that time.[58]

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[47] Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

[48] *Id.*; *accord* Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.").

[49] *Harlow*, 457 U.S. at 807.

[50] *Id.* at 817; *see also* Brown, *supra* note 44, at 876 ("Immunity, if upheld, stops litigation at an early stage.").

[51] *Harlow*, 457 U.S. at 817.

[52] *Pearson*, 129 S. Ct. at 815–16.

[53] *Id.* at 816; *accord* Tribble v. Gardner, 860 F.2d 321, 324 (9th Cir. 1988).

[54] *See generally Pearson*, 129 S. Ct. 808.

[55] *See id.*

[56] *Id.* at 818.

[57] *Id.*

[58] *Id.* at 818–19. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6, at 548–57 (5th ed. 2007) (analyzing the doctrine of qualified immunity, the practical application of the *Harlow* test, and current issues with determining when a right is "clearly established").

In *Iqbal*, the Court collapsed the qualified immunity inquiry into the supervisory liability analysis.[59] Under the Court's view, a supervisor does not violate a "clearly established" constitutional right if the supervisor is not personally responsible for the violation.[60] In conflating these two analyses, the Court provided additional protections for the discretionary decisions that supervisory officials made; the Court likely did so for the same policy reasons that the qualified immunity defense was put in place.[61] Uncertainty about the scope of supervisory liability is problematic for both plaintiffs and defendants alike. Government officials need clear rules about the scope of their supervisory responsibilities in order to avoid becoming overly cautious in the administration of their duties.[62] At the same time, plaintiffs need to know how to plead and prove allegations against supervisors who, they believe, may be responsible for their constitutional injury.

In sum, a coherent standard for supervisory liability is necessary because vicarious liability does not exist for government officials. While it is essential to provide government officials with protections that allow them to do their jobs properly, they must nonetheless have incentives to protect individuals' constitutional rights.

C. *Various Interpretations of the* Iqbal *Decision*

Following the *Iqbal* decision, circuit courts have expressed uncertainty about the appropriate standard for supervisory liability.[63] Several interpretations have emerged.[64] One is that *Iqbal* eliminated su-

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[59] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

> In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

Id.

[60] *Id.*

[61] *See supra* text accompanying notes 40–45.

[62] Nahmod, *supra* note 37, at 286 ("The primary policy concern is that the functions performed are so very important that we do not want this defendant—often high profile—to be worried about the possibility of being sued rather than focusing on making the difficult decisions that he or she is supposed to make.").

[63] *See, e.g.*, Bayer v. Monroe Cnty. Children & Youth Servs., 577 F.3d 186, 190 n.5 (3d Cir. 2009) ("In light of the Supreme Court's recent decision in *Ashcroft v. Iqbal*, it is uncertain whether proof of such personal knowledge, with nothing more, would provide a sufficient basis for holding . . . [the supervisory official] liable.") (internal citations omitted).

[64] *See infra* text accompanying notes 75–109.

pervisory liability entirely.[65] An alternative interpretation is that *Iqbal* might now require plaintiffs to prove that the supervisors purposely intended to cause the constitutional violation, rather than permit any lesser standard such as unreasonableness, negligence, or recklessness.[66] Another related interpretation is that *Iqbal* is a limited ruling that applies only to intent-based claims or to situations involving exigent circumstances and national security concerns.[67]

As previously addressed, the current state of supervisory liability is unclear as courts have been uncertain regarding the *Iqbal* decision's substance and scope. Several circuit courts have noted in dicta that *Iqbal* might have altered the standard for all supervisory liability claims.[68] In nearly all of these cases, though, the circuit courts have ruled on narrower grounds[69] and have opted to refrain from making

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[65] Lewis v. Tripp, 604 F.3d 1221, 1227 n.3 (10th Cir. 2010).

[66] *See* al-Kidd v. Ashcroft, 580 F.3d 949, 992 n.13 (9th Cir. 2009) (Bea, C.J., concurring in part, dissenting in part) ("It is doubtful that the majority's 'knowing failure to act' standard survived *Iqbal*.").

[67] For such an interpretation of Iqbal, see Nahmod, supra note 37.

[68] *See Lewis*, 604 F.3d at 1227 n.3 ("[*Iqbal*] has generated significant debate about the continuing vitality and scope of supervisory liability not only in *Bivens* actions, but also in § 1983 suits like the one before us.").

> At one end of the spectrum, the *Iqbal* dissenters seemed to believe that the majority opinion 'eliminates . . . supervisory liability entirely . . . . At the other end of the spectrum, the Ninth Circuit has read *Iqbal* as possibly holding that 'purpose . . . is required' merely in cases of alleged racial discrimination by government officials, given that *Iqbal* itself involved allegations of racial discrimination and such discrimination only violates the Constitution when it is intentional.

Id.; *see also* Arocho v. Nafziger, 367 F. App'x 942, 947 n.4 (10th Cir. 2010) ("[T]he basic concept of § 1983 or *Bivens* supervisory liability itself may no longer be tenable."); *Bayer*, 577 F.3d at 190 n.5 ("In light of the Supreme Court's recent decision in *Ashcroft v. Iqbal*, it is uncertain whether proof of such personal knowledge, with nothing more, would provide a sufficient basis for holding . . . [the supervisory official] liable.") (internal citations omitted); Maldonado v. Fontanes, 568 F.3d 263, 274 n.7 (1st Cir. 2009) ("Some recent language from the Supreme Court may call into question our prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability.").

[69] Only the Ninth and Tenth Circuits have actually interpreted the *Iqbal* decision regarding the standard for supervisory liability. *See* Dodds v. Richardson, 614 F.3d 1185 (10th Cir. 2010); Starr v. Baca, No. 09-55233, 2011 U.S. App. LEXIS 15283, at *10–11 (9th Cir. July 25, 2011).

> A plaintiff may . . . succeed in a § 1983 suit against a defendant-supervisor by demonstrating: (1) the defendant promulgated, created, implemented, or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.

Dodds, 614 F.3d at 1199.

broad pronouncements that *Iqbal* in fact eliminated the possibility of supervisory liability.[70] In general, despite the seemingly clear language of *Iqbal*, lower courts have been confused as to how broad the scope of the ruling was.[71] This uncertainty is perhaps attributable to the rhetoric of Justice Souter's passionate dissent. Souter wrote, "Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely."[72] He continued, "The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects."[73] Justice Souter then criticized the majority for allegedly allowing only two outcomes with the standard for supervisory liability: (1) respondeat superior, or (2) no supervisory liability at all.[74] This rhetoric may be responsible for the confusion regarding the substance and scope of the majority opinion.

One interpretation of the scope of *Iqbal*—the view articulated by Justice Souter—is that *Iqbal* eliminated supervisory liability entirely.[75] This interpretation is derived, in part, from the language in the decision stating that "supervisory liability is a misnomer."[76] Some commentators have understood this statement to mean that supervisory liability no longer exists as a distinct concept; rather, supervisors now must meet the same requirements as the subordinate.[77] The majority opinion also explains that the supervisor must be personally involved in the alleged constitutional violation and that mere knowledge is in-

[70] *See, e.g.*, *Lewis*, 604 F.3d 1221; *Arocho*, 367 F. App'x 942; *al-Kidd*, 580 F.3d 949; *Bayer*, 577 F.3d 186; *Maldonado*, 568 F.3d 263. For articles outlining the confusion in the wake of the *Iqbal* decision, see Michael Dorf, *Pondering* Iqbal*:* Iqbal *and Bad Apples*, 14 LEWIS & CLARK L. REV. 217; Kinports, *supra* note 40; Nahmod, *supra* note 37; Victor Romero, *Interrogating* Iqbal*: Intent, Inertia, and (a lack of) Imagination*, 114 PENN ST. L. REV. 1419 (2010).

[71] *See, e.g.*, Castellar v. Caporale, No. CV-04-3402, 2010 U.S. Dist. LEXIS 91191 (E.D.N.Y. Sept. 2, 2010).

[72] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1957 (2009) (Souter, J., dissenting).

[73] *Id.*

[74] *Id.* at 1958.

[75] *See, e.g.*, Petition for Writ of Certiorari at 30–31, Ashcroft v. al-Kidd, 580 F.3d 949 (2010) (arguing that Court of Appeals for the Ninth Circuit erred because *Iqbal* held that government officials may never be personally liable for misconduct of subordinate officials); *Iqbal*, 129 S. Ct. at 1957 (Souter, J., dissenting) ("Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely.").

[76] *Iqbal*, 129 S. Ct. at 1949.

[77] *See, e.g.*, Howard Wasserman, Iqbal *III: The Death of Supervisory Liability*, PRAWFSBLAWG (May 19, 2009, 7:38 AM), http://prawfsblawg.blogs.com/prawfsblawg/2009/05/iqbal-iii-the-death-of-supervisory-liability.html.

sufficient to hold the supervisor liable.[78] This first interpretation is derived from the opinion's language—taken in the abstract and out of context—without the particularized application of these statements to the specific constitutional violations alleged in the case.[79]

According to proponents of this view, there is no *supervisory* liability, but rather, a supervisor is only liable if that supervisor directly participated in the alleged unconstitutional conduct.[80] Because there is undisputedly no respondeat superior liability for government officials,[81] this interpretation of *Iqbal* suggests that supervisors can never be held liable for the conduct of their subordinates—that supervisory liability is dead.[82]

The second interpretation of *Iqbal*'s supervisory liability standard is far narrower. Under this interpretation, supervisors can be liable for their subordinates' constitutional violations only upon a showing of intent to cause such violations, regardless of the basis for the underlying claim.[83] This interpretation stems from the fact that in *Iqbal*, the Court required a showing of purpose or intent for the allegations of First and Fifth Amendment violations.[84] Under this interpretation of *Iqbal*, a supervisor would be liable if he or she directly instructed a subordinate to commit an act that violated an individual's constitutional rights, so long as the plaintiff could prove that the supervisor had the intention for such a result to occur.[85]

In line with the previous suggestion, a third interpretation is that the *Iqbal* ruling, requiring a showing of purpose or intent, was limited to those situations in which the underlying violation is an intent-

[78] *Iqbal*, 129 S. Ct. at 1949.

[79] For an example of this interpretation, see Wasserman, *supra* note 77.

[80] *Id.* In a case raising this very issue, the government argued that high level supervisory officials of ICE—sued for an alleged pattern and practice of unconstitutional home raids on immigrants—could only be liable if they themselves "directly planned or participated" in the underlying raids at issue. They rejected plaintiffs' proposed theory that those high level officials could be held liable for their knowledge of, and acquiescence in, the unconstitutional conduct of their subordinates. Brief for Appellants at 24, 31, Argueta v. U.S. Immigration & Customs Enforcement, No. 10-1479 (3d Cir. Oct. 6, 2010), ECF No. 003110306015.

[81] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

[82] *See* Wasserman, *supra* note 77.

[83] *See, e.g.*, Individual Federal Defendants Myers, Torres, Weber, and Rodriquez's Motion to Dismiss Plaintiff's Second Amended Complaint at 20–21, Argueta v. U.S. Immigration & Customs Enforcement, No. 08-1652 (D.N.J. June 18, 2009), ECF No. 108 [hereinafter Individual Federal Defendants' Motion to Dismiss] ("An allegation of 'mere knowledge,' however, is not enough to hold a supervisor personally liable in a *Bivens* action.").

[84] *Iqbal*, 129 S. Ct. at 1948.

[85] *See* Individual Federal Defendants' Motion to Dismiss, *supra* note 83, at 20–21.

based claim.[86] Under this interpretation, the required mental state of the supervisor will mirror that of the subordinate and will be derived from the underlying constitutional claim.[87] With this understanding, claimants for Eighth Amendment violations or Fourth Amendment violations need not show purpose or intent. Rather, they must satisfy each amendment's mental state—namely, recklessness and objective unreasonableness, respectively.[88]

For clarification of the various interpretations, consider a hypothetical: there are three officials: (1) a patrol officer, (2) a superior officer, and (3) a chief officer. The superior officer sees his subordinate patrol officer searching the passenger compartment of every car pulled over for a traffic violation. The superior officer does not intervene. The chief officer hears that this type of conduct is occurring but fails to investigate or remedy any wrongdoing. Assume for the sake of the hypothetical that the patrolman's search violates the driver's clearly established rights under the Fourth Amendment, and that a reasonable officer would have known that he or she was violating the individual's constitutional rights; accordingly, the patrolman would not be entitled to the qualified immunity defense.[89]

Applying the first interpretation—that supervisory liability is abolished—only the patrol officer who actually conducted the unlawful search of the individual's passenger compartment during the traffic stop would be liable under a § 1983 or *Bivens* action. The superior officer would not be liable because his failure to intervene would be insufficient to satisfy the heightened supervisory liability standard. The same rationale applies to the chief officer who merely heard that the unconstitutional conduct was occurring. The lack of direct involvement would shield the supervisory defendants from liability under this interpretation even when the plaintiff's right to be free from the patrolman's search is clearly established.

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[86] *See, e.g.*, Plaintiff's Memorandum of Law in Opposition to Individual Defendants' Motion for Reconsideration at 3–4, Argueta v. U.S. Immigration & Customs Enforcement, No. 08-1652 (D.N.J. June 22, 2009), ECF No. 109 (explaining that *Iqbal* logically required intent or purpose for supervisors because it is "hornbook law that, in order to state a claim for racial discrimination . . . or religious discrimination . . . a plaintiff must prove that the relevant decision-maker discriminated specifically on the basis of race or religion—i.e. with an invidious purpose or mindset"). Thus, the requirement of purpose or intent in *Iqbal* was derived from the underlying constitutional claim and not from the defendant's status as a supervisor. *Id.*

[87] *See id.*

[88] *See* Farmer v. Brennan, 511 U.S. 825, 836–37 (1994); U.S. CONST. amend. IV; U.S. CONST. amend. VIII.

[89] *See* Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

Applying the second interpretation—that purpose or intent is required regardless of the underlying violation—the patrol officer would be liable for actually conducting the unlawful search that violated the driver's constitutional rights. In addition, the superior officer could be liable if the choice not to intervene was subjectively motivated by his intent to violate the driver's rights. Likewise, the chief officer would be liable only if the plaintiff could present evidence that the chief officer failed to respond to the concerns about which he knew because the chief officer intended for third parties to endure violations of their constitutional rights.[90]

Lastly, recall that the third interpretation requires a showing of the mental state mandated by the underlying violation. Because this is a Fourth Amendment violation, the mental state would need to reflect the underlying requirement of objective unreasonableness.[91] Applying this interpretation to the hypothetical, the patrol officer would be liable for actually conducting the unlawful search that caused the constitutional violation. Additionally, the superior officer would be liable for failing to intervene and stop his subordinate from causing the constitutional violation because this would be objectively unreasonable. To satisfy the personal involvement requirement for a Fourth Amendment claim, the standard of knowledge and acquiescence would be permissible.[92] If a court applied that standard, the chief officer would likely be liable because he was aware of the constitutional violations and acquiesced in that behavior through his failure to act and train his subordinates to refrain from engaging in such conduct. His personal liability would be permissible if his failure to act was objectively unreasonable.

The final interpretation of the *Iqbal* decision is that the holding is limited to the exigent circumstances surrounding Ashcroft and Mueller's policy decisions.[93] Ashcroft argued that national security interests should be relevant to the Court's decision regarding his

[90] Holding the supervisors liable in this type of situation, while relatively simple in theory, would be exceedingly difficult in practice. This is, in large part, due to the *Iqbal* decision pertaining to the pleading standard. While not the focus of this Comment, the *Iqbal* Court's holding that allegations that are merely conclusory do not merit the presumption of truth that factual allegations receive in a motion to dismiss or motion for summary judgment. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1952 (2009).

[91] *See* U.S. CONST. amend. IV.

[92] *See* discussion Part V *infra*.

[93] *See, e.g.*, Nahmod, *supra* note 37; Steinman, *supra* note 2, at 1326 (referring to *Iqbal* as an "exceptional" case).

qualified immunity.[94] In order to understand the basis for suggesting such an interpretation, it is essential to detail the national security situation that Ashcroft and Mueller faced. The record showed that after the attacks on September 11th, the Department of Justice initiated an extensive investigation in an attempt to apprehend those responsible.[95] Over 4,000 special agents and 3,000 support personnel were involved in this initiative, and within one week, the FBI had 96,000 potential leads.[96] In response to this situation, the FBI questioned over 1,000 potential suspects regarding the attacks and terrorism generally.[97] Out of the 1,000 initially questioned, "762 were held on immigration charges . . . and a 184-member subset of that group was deemed to be of high interest to the investigation."[98] Those who were designated as "high interest" suspects were imprisoned in such a manner so as to eliminate the potential for communication with other suspected terrorists.[99]

Ashcroft argued that he was entitled to qualified immunity and urged the district court to dismiss his claims given the "unusual and extraordinary threat to the national security and foreign policy of the United States."[100] Although both lower courts rejected this argument, one can argue that the Supreme Court considered it a pertinent factor in reversing the lower courts' decisions. After all, Judge Cabranes's concurring opinion from the Court of Appeals for the Second Circuit reflected a general concern for subjecting high-level government officials to liability for decisions made regarding national security.[101] Judge Cabranes articulated the need for *additional* leeway because society does not want the most qualified individuals to reject high-level positions due to fear of personal liability.[102] Likewise, socie-

[94] Motion to Dismiss the Claims Against Attorney General John Ashcroft in His Individual Capacity at 5, Elmaghraby v. Ashcroft, No. 04-CV-1809, 2005 U.S. Dist. LEXIS 21434 (E.D.N.Y. Sept. 27, 2005) (No. 04-CV-1809) [hereinafter Motion to Dismiss Claims Against Ashcroft].

[95] *Iqbal*, 129 S. Ct. at 1943 (quoting DEPT. OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1, 11–12 (2003)).

[96] *Id.*

[97] *Id.*

[98] *Id.* (internal quotations omitted).

[99] *Id.*

[100] Motion to Dismiss Claims Against Ashcroft, *supra* note 94 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)).

[101] Iqbal v. Hasty, 490 F.3d 143, 178–79 (2d Cir. 2007) (Cabranes, C.J., concurring).

[102] *Id.*

ty does not benefit from deterring supervisory officials from making certain controversial decisions because of this same fear.[103]

In sum, Judge Cabranes conceded that the majority's "discussion of the relevant pleading standards reflect[ed] the uneasy compromise . . . between a qualified immunity privilege rooted in the need to preserve the effectiveness of government . . . and the pleading requirements" of Federal Rule of Civil Procedure 8(a).[104] Notwithstanding his agreement that it was an uneasy compromise, he was concerned with the potential for "subjecting high-ranking Government officials—entitled to assert the defense of qualified immunity and charged with responding to 'a national and international security emergency unprecedented in the history of the American Republic'—to the burdens of discovery on the basis of a complaint as nonspecific as respondent's."[105] Because of this serious concern, Judge Cabranes passionately urged the Supreme Court to grant certiorari.[106] The Supreme Court endorsed Judge Cabranes's perspective as the Court quoted his language—referenced above—twice in the majority opinion.[107]

III. THE MOST PLAUSIBLE INTERPRETATION OF THE *IQBAL* DECISION

As a matter of policy, courts should reject both the interpretation that *Iqbal* entirely abolishes supervisory liability and the interpretation that *Iqbal* now requires a showing of purpose or intent to cause the constitutional violation regardless of the underlying violation. In rejecting the interpretation that *Iqbal* entirely eliminated supervisory liability, it is important to note that the foundation for permitting § 1983 or *Bivens* claims against government officials for their constitutional violations is derived from public policy.[108] The scope of supervisory liability and qualified immunity is determined by balancing the societal interests "of deterring constitutional misconduct and compensating those whose rights have been violated" on the one hand, and "the governmental interest in ensuring that public officials are not unduly inhibited in the performance of their duties" on the oth-

[103] *Id.*
[104] *Id.* at 178 (internal quotations omitted).
[105] *Iqbal*, 129 S. Ct. at 1945 (quoting *Iqbal*, 490 F.3d at 179).
[106] *Iqbal*, 490 F.3d at 178 ("[I]t is worth underscoring that some of those precedents are less than crystal clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity; to say the least, the guidance they provide is not readily harmonized.") (internal quotations omitted).
[107] *Id.*
[108] Kinports, *supra* note 40, at 1291–92.

er.[109] In order to accomplish the goals of deterring future violations and compensating victims, a standard exists for holding supervisors liable.[110]

Supervisors are in a unique position that includes "the power and resources required to implement the reforms necessary to curb additional wrongdoing."[111] As an incentive to eliminate future violations, supervisors are exposed to liability.[112] In order to protect the government's interest in preserving the officials' abilities to perform their duties and avoid situations in which officials are distracted from their duties, society limits that exposure with the doctrine of qualified immunity.[113]

This policy objective is consistent with the modern Supreme Court interpretations of supervisory liability under § 1983 and is also consistent with the Supreme Court's decision in *Bivens* to extend this exposure to liability to federal officials.[114] It is highly unlikely that the *Iqbal* Court intended to eliminate 140 years of § 1983 case law and nearly forty years of *Bivens* case law in three short paragraphs. Also, the language of § 1983[115] indicates an intention that liability of supervisors apply in more situations than just those in which the supervisor directly causes the violation himself or herself. Section 1983 clearly states that any official is liable if he or she "subjects, or *causes* to be subjected" any citizen to the deprivation of constitutional rights.[116] Causing a citizen to be subjected to constitutional violations does not necessarily entail directly subjecting the citizen to the violation. If it abolished supervisory liability entirely, the Court, as a practical matter, would create absolute immunity for government officials. Under this approach, supervisors could avoid liability even when they directly instruct subordinates to cause constitutional violations.

In addition to rejecting the interpretation that supervisory liability is entirely eliminated, courts should also reject the interpretation that, post-*Iqbal*, all *Bivens* claims require a showing of purpose or in-

[109] *Id.* at 1292.
[110] *See id.*
[111] *Id.* at 1299.
[112] *Id.* at 1300–02.
[113] *See id.* at 1301.
[114] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 288, 391 (1971).
[115] "Every person who, under color of [state law], *subjects, or causes to be subjected*, any citizen . . . or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable . . . ." 42 U.S.C. § 1983 (2006) (emphasis added).
[116] *Id.* (emphasis added).

tent. Under a thorough analysis of the *Iqbal* decision, both the language of the opinion and the context in which the decision was made indicate that the ruling on the scope of supervisory liability was limited, and it did not eliminate all *Bivens* claims that lack a showing of purpose or intent.

A. *The Context of the* Iqbal *Ruling*

To understand the *Iqbal* ruling, it is necessary to consider the issue regarding supervisory liability that was actually before the Supreme Court. According to the petition for certiorari, the issue was

> [w]hether a cabinet-level officer or other high ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had *constructive notice* of the discrimination allegedly carried out by such subordinate officials.[117]

The scope of supervisory liability was not before the Court because the defendants did not contest the plaintiff's suggested standard.[118] The defendants had conceded that, if they had *actual knowledge* of the discriminatory nature of the plaintiff's classification and had been deliberately indifferent to that discriminatory nature, they would be subject to supervisory liability.[119] Because of this concession, the parties never argued the scope of supervisory liability.[120] The parties in *Iqbal* agreed to a standard of supervisory liability and the Court, sua sponte, unnecessarily decided that the scope was something else.[121]

When the majority addressed this issue, it noted that a subordinate is only liable for unconstitutional discrimination if the plaintiff shows purpose, rather than mere knowledge.[122] The Court noted that supervisory officials are only responsible for their own misconduct

[117] Petition for Writ of Certiorari at 29, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (emphasis added).

[118] *Iqbal*, 129 S. Ct. at 1956.

[119] *Id.*

[120] *Id.* Justice Souter noted the "danger of 'bad decisionmaking' when the briefing on a question is 'woefully inadequate'" and pointed out that in *Iqbal*, the Court did not receive any briefing on this issue. *Id.* at 1957 (Souter, J., dissenting) (quoting Pearson v. Callahan, 555 U.S. 223, 225 (2009)). Justice Souter continued to express his concern regarding the unfairness that this decision had on Iqbal who detrimentally relied on his adversary's concession and was not given the proper opportunity to brief the issue being decided. *Id.*

[121] *Id.*

[122] *Id.* at 1949 (majority opinion).

because there is no vicarious liability under a *Bivens* claim.[123] Additionally, the Court concluded that because a subordinate is only liable upon a showing of purpose to discriminate, a supervisory official is only liable for unconstitutional discrimination if the plaintiff shows purpose to discriminate rather than mere knowledge of the subordinate's discriminatory intentions.[124] The Court was deciding whether it was permissible for the subordinate's mental state to transfer to the supervisory official. The Court was *not* deciding whether all *Bivens* claims require a showing that the supervisory official purposefully intended for a constitutional violation to occur. As the majority opinion stated, "The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue."[125]

B. *The Language of the* Iqbal *Ruling.*

Writing for the majority, Justice Kennedy noted at several points that "purpose rather than knowledge" is the requisite factor.[126] This reference, however, is never made without a qualifying statement that the requirement is for an unconstitutional discrimination claim.[127] The importance of these quotes in context is that the Court never made any broad statements declaring a need for purpose or intent, but rather the majority limited the requirement of purpose or intent to those claims based on First or Fifth Amendment violations of discrimination.

In line with the limitations of the language in the *Iqbal* decision, this Comment accepts the interpretation that the scope of the *Iqbal*

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[123] *Id.*

[124] *Iqbal*, 129 S. Ct. at 1948–49.

[125] *Id.* at 1948.

[126] *See id.* at 1947–49.

[127] *See, e.g.*, *id.* at 1947 ("We begin by taking note of the elements a plaintiff must plead to state *a claim of unconstitutional discrimination* against officials entitled to assert the defense of qualified immunity.") (emphasis added); *id.* at 1948 ("The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. *Where the claim is invidious discrimination in contravention of the First and Fifth Amendments*, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose.") (emphasis added); *id.* at 1948–49 ("It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of *discriminating on account of race, religion, or national origin.*") (emphasis added); *id.* at 1949 ("In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate *for unconstitutional discrimination*; the same holds true for an official charged with violations arising from his or her superintendant responsibilities.") (emphasis added).

decision is limited to intent-based claims. Contrary to Justice Souter's dissent, the requirement that the supervisory official's mental state mirror that required by the underlying constitutional violation logically follows from the established principle that there is no vicarious liability for government officials. Without vicarious liability, the subordinate's faults are not imputed to the supervisor and, consequently, the supervisory official must satisfy the requirements of supervisory liability in order to be personally liable.

In order for a plaintiff to succeed on a discrimination claim, the Court had previously held that the discriminatory policy or statute must be implemented "'because of,' not merely 'in spite of,'" its adverse effects upon an identifiable group."[128] Thus, the foundation of the claim would be undermined if a supervisor were not required to meet that same mental element because the supervisor would then be held to a lower standard—vicarious liability. This interpretation appropriately balances the desire to hold supervisory officials liable to deter future constitutional violations and compensate victims of violations, while still protecting government officials from endless personal liability. Consequently, it is appropriate to conclude that *Iqbal*'s elimination of the possibility that "knowledge and acquiescence" could satisfy the personal involvement requirement of supervisory liability is limited to intent-based claims.

Likewise, given the limited nature of the *Iqbal* decision, the interpretation that the scope is narrowed by the presence of exigent circumstances is also a feasible one. The idea that certain situations require impulsive decisions and should not be evaluated in the same manner as those that result from extensive planning and deliberation is an established concept for the Court.[129] The Court might have been more hesitant to hold Ashcroft and Mueller liable for the policies that they implemented while they were trying to avoid another terrorist attack in the wake of September 11th. In the context of a national emergency "unprecedented in the history of the American republic,"[130] the Court may have felt additionally compelled to pro-

[128] Personal Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

[129] *See, e.g.*, Cnty. of Sacramento v. Lewis, 523 U.S. 833, 852 (1998) (requiring purpose to harm rather than deliberate indifference because "'a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance'" (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986))).

[130] *Iqbal*, 129 S. Ct. at 1944 (quoting Iqbal v. Hasty, 490 F.3d at 178–79) (Cabranes, C.J., concurring).

vide protection to high-level officials from liability.[131] That being said, the impact of the Court's decision does not rest on national security interests.

Under this analysis of the *Iqbal* decision, the best interpretation is that it impacted the supervisory liability standard by clarifying the requisite mental state that a plaintiff must plead in order for a supervisory official to be held personally liable for the constitutional violations of his or her subordinates. Before *Iqbal*, there was no set standard, and courts implemented different requirements. Some courts required recklessness,[132] others required only a showing of knowledge and acquiescence,[133] and one court permitted the imposition of liability upon only a showing of gross negligence by the supervisor.[134]

Now, post-*Iqbal*, the supervisor's mental state must reflect the mental state that the underlying constitutional violation sets forth. Namely, for a First or Fifth Amendment violation, a claimant must show that the supervisor had the requisite purpose or intent to cause the violation;[135] for a Fourth Amendment violation, the plaintiff must show that the supervisor was objectively unreasonable;[136] and for an Eighth Amendment violation, the plaintiff must show that the supervisor acted recklessly towards the individual's constitutional rights.[137] In sum, the most plausible reading of the *Iqbal* decision in the context of supervisory liability is that the mental state of the supervisor must mirror that of the subordinate. The ruling that "knowledge and acquiescence" will no longer suffice to establish personal involvement was limited to intent-based claims because mere knowledge of an underling's discrimination is not proof that the supervisor himself had the invidious intent to discriminate.

Intent-based claims, like those presented in *Iqbal*, rightfully require intent on the part of the supervisor. There are, however, a host

[131] While the language of the decision insinuates that the more plausible interpretation is that the ruling was limited to intent-based claims, the Court's reluctance to impose personal liability on Ashcroft and Mueller is almost certainly relevant to the national security interests at the center of these policy decisions. Specifically, the Court was likely motivated to reach the outcome it did because of a concern for the exigent circumstances that surrounded Ashcroft and Mueller's decision-making responsibilities.

[132] *E.g.*, Serna v. Colo. Dep't of Corr., 455 F.3d 1146, 1151 (10th Cir. 2006); Estate of Davis v. City of N. Richland Hills, 406 F.3d 375, 381 (5th Cir. 2005).

[133] *E.g.*, Morfin v. City of East Chicago, 349 F.3d 989, 1001 (7th Cir. 2003); Doe v. City of Roseville, 296 F.3d 431, 440 (6th Cir. 2002).

[134] Poe v. Leonard, 282 F.3d 123, 140 (2d Cir. 2002).

[135] *See* Washington v. Davis, 426 U.S. 229, 239–41 (1976).

[136] *See* U.S. CONST. amend. IV.

[137] *See* Farmer v. Brennan, 511 U.S. 825, 836–37 (1994).

of standards for other violations and the required mental element should mirror that of the underlying violation. This requirement, in addition to the required showing of the supervisor's personal involvement,[138] sufficiently shields government officials from respondeat superior.

IV. THE PROPER STANDARD FOR SUPERVISORY LIABILITY

The doctrine of supervisory liability is complex and multifaceted. As a result, there is a significant need for a clear and uniform standard for all courts throughout the country to apply consistently. Uniformity throughout jurisdictions is necessary because of situations—such as the one in *Iqbal*—in which the government official is in such a high position that he oversees subordinates throughout the United States. By adopting one set standard, the Supreme Court would enable government officials to conform their conduct to the established requirements, such that officials would not fear the ramifications of inconsistent personal liability standards throughout the country.

After analyzing several variations of the standard for supervisory liability, this Comment suggests a two-prong test that will sufficiently balance the interests of the government officials and those of individual citizens. Government officials aim to avoid liability for the decisions they make within the scope of their official roles.[139] Similarly, courts seek to compensate victims of constitutional violations and induce high-level officials to more thoroughly implement and oversee policies that eliminate the occurrence of these violations.[140] Given these concerns, this Comment's two-prong test requires: (1) a showing of personal involvement on the part of the supervisor, and (2) a showing of the requisite mental state that is derived from the underlying constitutional violation at issue.[141]

These requirements are not new concepts to the doctrine of supervisory liability. Rather, courts have consistently used these concepts, and the *Iqbal* decision reiterated their existence. This Comment suggests a test that will clarify and explain these longstanding principles. In *Dunlop v. Monroe*, a case from 1812, the Supreme Court first introduced the idea that, in order to be liable, a supervisor must be personally involved in the underlying wrongdoing.[142] In *Dunlop*,

[138] *See* discussion *infra* Part V.
[139] *See* Kinports, *supra* note 40, at 1293–94.
[140] *Id.* at 1294.
[141] This second prong reflects the ruling from *Iqbal*.
[142] 11 U.S. 242 (1812).

the Court determined the circumstances under which a postmaster would be liable for his subordinate's errors.[143] While this case was decided two hundred years ago, its holding is consistent with current case law[144] and was cited by the Supreme Court in *Ashcroft v. Iqbal*.[145] Essentially, the Court held that the postmaster must be personally involved in his subordinate's wrongdoing.[146] According to the Court, the alleged failure-to-supervise claim could feasibly satisfy the personal involvement requirement so long as the plaintiff alleged that the postmaster *affirmatively* failed to supervise, presumably either with knowledge of the subordinate's errors or with some type of an affirmative duty to do so.[147] Based on this rationale, the Court held that a plaintiff could not simply allege that the postmaster was the supervisor of the subordinate who caused the violation and that he was consequently liable merely due to his supervisory position alone.[148] Thus, by 1812, the Court had already established that respondeat superior would be insufficient.[149]

Regarding the required mental state, court decisions have varied depending on the jurisdiction and the details of the violation,[150] but the significance of *Iqbal* is that it clarifies this prong.[151] Now, regardless of the jurisdiction, in order for a supervisor to be liable for the violations of his or her subordinates, the plaintiff must show that the supervisor's mental state mirrored that of the subordinate—the mental state derived from the relevant constitutional provision that forms the basis of the claim.[152] This outcome is completely in line with the

[143] *Id.* at 244.

[144] *See, e.g.*, Dodds v. Richardson, 614 F.3d 1185, 1199 (10th Cir. 2010) ("[I]ndividual liability under § 1983 must be based on personal involvement in the alleged constitutional violation, but personal involvement is not limited solely to situations where a defendant violates a plaintiff's rights by physically placing hands on him.") (internal quotation marks and citations omitted).

[145] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009).

[146] *Dunlop*, 11 U.S. at 269.

[147] *Id.*

[148] *Id.*

[149] *See id.*

[150] *See, e.g.*, Serna v. Colo. Dep't of Corr., 455 F.3d 1146, 1151 (10th Cir. 2006); Morfin v. City of East Chicago, 349 F.3d 989, 1001 (7th Cir. 2003); Poe v. Leonard, 282 F.3d 123, 140 (2d Cir. 2002).

[151] *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009) ("The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose.").

[152] *See id.*

theory that there is no vicarious liability for government officials—the subordinate's guilty mind is not imputed to the supervisor.

In conducting this analysis, it is important to note that the requirement of personal involvement and the requisite mental element are often conflated.[153] Some courts have concluded that a showing of knowledge and acquiescence or deliberate indifference alone will satisfy the supervisory liability standard.[154] This Comment rejects that contention on the basis that it does not sufficiently protect a government official's interests in avoiding liability simply for being in an authoritative position.[155] Knowledge and acquiescence as well as deliberate indifference may satisfy the personal involvement prong, but the required mental state is also necessary in order to fully satisfy the supervisory liability standard.

The test that this Comment proposes first requires a showing that the supervisory official was personally involved in the violation and second, that he or she exhibited the required mental state in regards to the violation. To clarify the first requirement, this Comment now directly addresses the Court's language of a "personal involvement" requirement and clarifies what types of acts can satisfy this prong. In order to do this, it is useful to analyze pre-*Iqbal* case law.

Even though *Iqbal* makes clear that a plaintiff must show that the high-level official had some personal involvement with the subordinate's actions, courts are still unclear as to what personal involvement means.[156] Some courts have interpreted personal involvement narrowly, essentially requiring direct involvement.[157] Based on the policy rationale behind supervisory liability, this cannot be a correct application of the personal involvement requirement because personal involvement is not synonymous with direct contact.[158] As a policy matter, this would mean that high-level officials would be permitted to implement intentionally discriminatory policies and avoid liability by simply requiring that their subordinates follow them through. So

[153] *See, e.g.*, Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir. 1989).

[154] *See id.*

[155] *See supra* Part III.

[156] *See* Arias v. U.S. Immigration & Customs Enforcement Div. of the Dep't. of Homeland Sec., No. 07-1959, 2009 U.S. Dist. LEXIS 61519, at *9–10 (D. Minn. July 17, 2009) (holding that high-level government officials are personally liable only when they have direct involvement with the individual plaintiffs or when a failure to supervise or train causes the deprivation of constitutional rights).

[157] *See, e.g.*, Rode v. Dellarciprete, 845 F.2d 1195, 1207–08 (3d Cir. 1988) (holding that personal involvement can only be satisfied by personal direction or, in limited circumstances, with particularized assertions, knowledge and acquiescence).

[158] *See* Dodds v. Richardson, 614 F.3d 1185, 1195 (10th Cir. 2010).

long as those high officials never left their offices and never had direct contact with any of the individuals whose rights were violated by the policies, they would never be personally liable under a §1983 or *Bivens* claim. As a policy matter, this cannot be correct.

A. *Prior Supreme Court Decisions*

The Supreme Court addressed personal involvement in the supervisory liability context on several occasions prior to *Iqbal*. In understanding the current state of the personal involvement requirement and the evolution of the supervisory liability standard generally, it is helpful to outline those major cases that led up to *Iqbal*.

First, in *Rizzo v. Goode*, plaintiffs brought two class actions against Philadelphia's mayor, the city's managing director, and supervisory police officials.[159] The plaintiffs sought equitable relief for an allegedly pervasive pattern of unconstitutional police mistreatment of city residents, in particular the minority citizens.[160] The District Court held the defendants liable because of their failure to act in the face of the statistical pattern of misconduct.[161] The court entered an order that required the implementation of a new program designed to prevent future misconduct,[162] and the Third Circuit affirmed.[163]

On appeal, the Supreme Court found that the evidence on the record did not establish that the named defendants had implemented any policy to violate the constitutional rights of the plaintiff classes.[164] The lower court had found that there was evidence of a departmental procedure indicating a tendency to discourage the filing of civilian complaints and to minimize the consequences of police misconduct.[165] The Supreme Court, however, held that the violators of the named plaintiffs' constitutional rights were individual police officers not named in the action.[166] In regard to the supervisory officials, the Court held that there was no affirmative link between a plan or policy implemented by the defendants and the violations that the plaintiffs endured.[167] The "affirmative link" language seemingly be-

[159] 423 U.S. 362, 366 (1976).
[160] *Id.* at 366–67.
[161] *Id.* at 366.
[162] *Id.* at 364.
[163] Goode v. Rizzo, 506 F.2d 542 (3d Cir. 1974), *rev'd* 423 U.S. 362.
[164] *Rizzo*, 423 U.S. at 375.
[165] *Id.* at 368–69.
[166] *Id.* at 367.
[167] *Id.* at 371.

came the foundation of the causation requirement and the personal involvement requirement that would evolve in later cases.

In *Rizzo*, the named defendants were merely in supervisory positions and did not exhibit any personal involvement with the individual plaintiffs' violations.[168] The district court concluded that "even without a showing of direct responsibility for the actions of a small percentage of the police force, petitioner's failure to act in the face of a statistical pattern is indistinguishable from the active conduct" in previous case law.[169] The Supreme Court rejected this possibility and required that supervisory officials only be held liable for *their own conduct*.[170]

Thus, *Rizzo* established that an affirmative link must exist between the supervisor and the violation. If a plaintiff aims to show a "failure to act" to satisfy the personal involvement prong, the *Rizzo* Court declared that the existence of a statistical pattern of misconduct is insufficient.[171] Presumably, a plaintiff would need to show that the supervisor had actual knowledge of the misconduct that was occurring and, despite that knowledge, failed to act.

The next major case to address the issue of supervisory liability was *City of Canton v. Harris*.[172] In that case, the police arrested the plaintiff and took her into custody.[173] Because she was continuously falling over, the police asked if she needed medical attention; she responded incoherently.[174] Upon her release from custody one hour later, the plaintiff's family took her to the hospital where she was diagnosed with several emotional ailments.[175] She was then hospitalized for one week and thereafter completed outpatient treatment for a year.[176]

The plaintiff subsequently filed a § 1983 claim alleging that, under the municipal regulations, police shift commanders had sole discretion to determine if someone in custody needed medical atten-

[168] *Id.* at 375.
[169] *Id.* at 375–76 (discussing the underlying rationale of the district court opinion).
[170] *Rizzo*, 423 U.S. at 377 (distinguishing the factual situation of *Rizzo v. Goode* from the previous decisions of Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), and Brown v. Bd. of Educ., 347 U.S. 483 (1954)).
[171] *Id.* at 375–76.
[172] 489 U.S. 378 (1989).
[173] *Id.* at 381.
[174] *Id.*
[175] *Id.*
[176] *Id.*

tion.[177] The municipality,[178] however, did not provide training to those shift commanders to teach them how to make such determinations; thus, the municipal liability claim was based on a failure to train.[179]

The Supreme Court held that inadequacy of police training may be the basis of § 1983 liability only when the failure to train amounts to a deliberate indifference to the rights of people with whom the police might come in contact.[180] In order for an action to amount to deliberate indifference, "a deliberate choice to follow a course of action . . . [must be] made from among various alternatives by city policymakers . . . [and] [o]nly where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality" will the courts impose liability.[181]

This case is significant in the evolution of the supervisory liability standard because it set out the basis for deliberate indifference as a method of satisfying the personal involvement prong. In *City of Canton*, the Court determined that deliberate indifference was satisfied if decision-makers had multiple choices and opted for the action that created an obvious risk of resulting violations.[182] In addition, this case set out the relationship between the mental requirement and the act requirement and demonstrated how easy it can be to conflate these two distinct prongs.[183]

The final case to analyze regarding the history of the supervisory liability standard is *Board of County Commissioners v. Brown*.[184] In *Brown*, the plaintiff was injured after a police deputy pulled him out of a truck following a police chase.[185] The plaintiff based the § 1983 claim on the county's inadequate screening when it hired the deputy because the deputy had a conviction for assault and battery, as well as other misdemeanor convictions.[186] The personal involvement prong

[177] *Id.* at 381–82.

[178] This case dealt with entity liability rather than liability of supervisory officials. The Court previously held that a municipal entity is a "person" under 42 U.S.C. § 1983, so the case law pertaining to § 1983 applies to entity liability. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

[179] *City of Canton*, 489 U.S. at 382.

[180] Note that an omission—a failure to act, supervise, or train—can satisfy the personal involvement prong. *See id.*

[181] *Id.* at 389 (quoting Pembaur v. Cincinnati, 475 U.S. 469, 483–84 (1986)).

[182] *See id.*

[183] *See id.*

[184] 520 U.S. 397(1997).

[185] *Id.* at 399–400.

[186] *Id.* at 401.

was the failure to screen, while the hiring amounted to deliberate indifference.[187]

In deciding whether liability attached, the Supreme Court explicitly stated that even if "inadequate scrutiny of an applicant's background would make a violation of rights more *likely* [, this] cannot alone give rise to an inference that a policymaker's failure to scrutinize the record of a particular applicant produced a specific constitutional violation."[188] Thus, the Court held that a failure to screen constitutes deliberate indifference and consequently satisfies the supervisory liability standard, but only in situations where the deprivation of constitutionally protected rights would be the unmistakably obvious consequence of hiring the potential applicant.[189] The Court also stated that "[i]n any § 1983 suit, [the] plaintiff must establish the state of mind required to prove the underlying violation."[190] This language strengthens the argument that *Iqbal* was not a groundbreaking case for the doctrine of supervisory liability. Instead, the *Iqbal* language is similar, if not identical, to the language used in prior Supreme Court cases, including in *City of Canton*.

B. *Prior Lower Court Decisions*

In order to reach a clear and uniform standard for the personal involvement prong of supervisory liability, the next step is to analyze how lower courts have interpreted these Supreme Court decisions. In general, jurisdictions differ in the type of actions they permit to satisfy the personal involvement requirement.[191] For example, the Ninth Circuit has held that,

> to be held liable, the supervisor need not be directly and personally involved in the same way as are the individual officers who are on the scene inflicting constitutional injury. Rather, the supervisor's participation could include his own culpable action or inaction in the training, supervision, or control of his subordinates, his acquiescence in the constitutional deprivations of which the complaint is made, or conduct that showed a reckless or callous indifference to the rights of others.[192]

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[187] *See id.*

[188] *Id.* at 410–11 (emphasis added).

[189] *See id.*

[190] *Brown*, 520 U.S. at 405.

[191] *See infra* text accompanying notes 192–196.

[192] Starr v. Baca, No. 09-55233, 2011 U.S. App. LEXIS 15283, at *6 (9th Cir. July 25, 2011) (quoting Larez v. City of L.A., 946 F.2d 630, 646 (9th Cir. 1991))(internal quotation marks omitted).

In contrast, the Third Circuit has held that personal involvement is satisfied through allegations of (1) personal direction or (2) actual knowledge and acquiescence.[193] This means that a supervisor would be liable if he or she directly instructed a subordinate to do something that would cause a constitutional deprivation to the third party, or if he or she actually knew that a subordinate was doing something that would violate a third party's constitutional rights and the supervisory official acquiesced in that behavior.[194]

Yet another standard exists in the Second Circuit, which has held that "[i]t is well settled . . . that 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.'"[195] The court has elaborated on the requisite showing by stating that

> the personal involvement of a supervisory defendant may be shown by evidence that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.[196]

As noted by this analysis of relevant circuit court opinions, the standard for satisfying the personal involvement prong varies significantly among the circuits. In striving for a uniform standard, it is necessary to set out an exhaustive list of actions that will satisfy the personal involvement prong of supervisory liability for courts in all jurisdictions to apply. After analyzing the different variations, this Comment will consolidate all of the relevant actions into three main categories. Namely, a supervisory official would be deemed personally involved in the violation of an individual's constitutional rights when said official either (1) directly caused the constitutional viola-

[193] Evancho v. Fisher, 423 F.3d 347, 353 (3d Cir. 2005); *see also* Zion v. Nassan, 727 F. Supp. 2d 388, 405–08 (W.D. Pa. 2010); Mincy v. McConnell, No. 09-236, 2010 WL 3092681, at *4 (W.D. Pa. July 15, 2010); Liberty & Prosperity 1776, Inc. v. Corzine, 720 F. Supp. 2d 622, 628–30 (D.N.J. 2010); Bullock v. Beard, No. 3:10-cv-401, 2010 WL 1507228, at *4 (M.D. Pa. Apr. 14, 2010).

[194] *See Evancho*, 423 F.3d at 353.

[195] Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) (quoting Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994)).

[196] *Id.* (citing *Wright*, 21 F.3d at 501).

tion, either through direct instruction or direct involvement; (2) was deliberately indifferent to the rights of the victim; or (3) had knowledge of the subordinate's conduct that caused the violation and acquiesced in said conduct.

As to the first means of satisfying the personal involvement requirement—directly depriving a third party of his or her constitutionally protected rights—the supervisory official may be liable even without the doctrine of supervisory liability.[197] Under these circumstances, a plaintiff might successfully bring a civil claim for a constitutional violation under § 1983 or *Bivens* generally without the need to rely on the supervisory liability standard. Without direct participation, the plaintiff would still satisfy this requirement by showing that the supervisory official directly instructed the subordinate.

In satisfying the second option—deliberate indifference—the plaintiff must show that the supervisory official disregarded an obvious consequence of his or her actions.[198] Finally, to satisfy the third option—knowledge and acquiescence—the plaintiff must show that the supervisory official had knowledge of the violation or the potential for the violation and acquiesced in the subordinate's conduct, which then caused the violation.[199] Presumably, most actions that are typically alleged in supervisory liability cases would fall into one of these three categories. For example, claims of failure to train, failure to supervise, or failure to screen while hiring would fit under the deliberate indifference standard, so long as the supervisors acted recklessly. Similarly, failure to discipline or failure to remedy would fall within the knowledge and acquiescence option. As a matter of policy, it would be impractical for a supervisory official to avoid liability for depriving an individual of constitutional rights simply because the official was not present and solely responsible. Liability should attach when supervisors set in motion a series of acts that ultimately cause the violation.

As this Comment has now set up the ways in which a plaintiff can satisfy the personal involvement prong, it is crucial to remember that satisfying that prong is not dispositive for satisfying the supervisory liability standard.[200] In addition, the plaintiff must sufficiently plead the requisite mental state derived from the underlying violation.[201]

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[197] *See* 42 U.S.C. § 1983 (2006).

[198] Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 410 (1997).

[199] *See, e.g.*, Womack v. Smith, No. 1:06-CV-2348, 2009 U.S. Dist. LEXIS 120728, at *13 (M.D. Pa. Dec. 29, 2009).

[200] *See supra* text accompanying notes 139–42.

[201] *See id.*

Namely, the common mental state requirements include: intent or purpose for First or Fifth Amendment claims,[202] objective unreasonableness for Fourth Amendment claims,[203] and recklessness for Eighth Amendment claims.[204] In sum, a plaintiff will satisfy the supervisory liability standard only when both of the requisite prongs are sufficiently pled.

C. *Implications of this Comment's Proposed Test*

This table demonstrates the implications of this Comment's test by setting out the requisite showing by a plaintiff seeking to succeed on a claim of supervisory liability against a supervisory official.[205]

	Direct Causation	Deliberate Indifference	Knowledge and Acquiescence
First or Fifth Amendment Violations (Purpose or Intent Required)[206]	Officials are liable for directly[207] engaging in the violating behavior with the purpose to discriminate.	Officials are liable for ignoring an obvious risk or consequence[208] of their actions with the purpose to discriminate.	Officials are liable for knowing that subordinates are engaging in certain behavior and acquiescing[209] in that behavior with the purpose[210] to discriminate.[211]

[202] *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 532–33, 540 (1993); Washington v. Davis, 426 U.S. 229, 240 (1976).

[203] *See* U.S. CONST. amend IV.

[204] *See* Farmer v. Brennan, 511 U.S. 825, 836–37 (1998).

[205] Note that this table does not directly implicate the doctrine of qualified immunity. Consequently, a supervisory official within these situations could succeed on a motion to dismiss under qualified immunity if he or she could show that the law governing his or her actions was not clearly established or that a reasonable official in his or her position would have considered his or her conduct to be lawful. *See* Pearson v. Callahan, 555 U.S. 223 (2009).

[206] Washington v. Davis, 426 U.S. 229 (1976).

[207] By directly engaging in the violating conduct, this could mean that their role as supervisors is essentially irrelevant. In these situations, they are directly responsible, rather than being responsible in the context of their decision-making authority. Another action that falls within this category would be directly instructing a subordinate to do something that causes a violation (i.e., directing a subordinate police officer to conduct an unlawful search).

[208] A commonly cited example of a supervisor ignoring an obvious risk is a failure to train police officers in the use of firearms.

[209] Common examples of knowledge and acquiescence include when supervisors are aware of certain issues and fail to discipline those subordinates that are responsible or fail to remedy their policies or practices.

[210] Note that this is undoubtedly an issue for pleading because a plaintiff must plead, without simply making conclusory statements, that the supervisory officials intended their policies or actions to result in constitutional violations of third parties.

Fourth Amendment Violations (Objective Unreasonableness)[212]	Officials are liable for directly conducting the objectively unreasonable search or seizure.	Officials are liable for ignoring an obvious risk or consequence of their actions and they were objectively unreasonable in acting in such a manner.	Officials are liable for knowing that subordinates are engaging in certain behavior and acquiescing in that behavior when doing so is objectively unreasonable.
Eighth Amendment Violations (Recklessness)[213]	Officials are liable for directly engaging in the violating behavior—namely causing the cruel and unusually behavior – and doing so in a reckless manner.	Officials are liable for recklessly ignoring an obvious risk or consequence of their actions.	Officials are liable for knowing that subordinates are engaging in certain behavior and recklessly acquiescing in that behavior.

In applying the test put forth in this Comment, a plaintiff may succeed on a claim for a First or Fifth Amendment violation upon a showing that the supervisory defendant was directly involved in the violation and acted in the manner alleged with the purpose or intent to violate the plaintiff's constitutional rights. Alternatively, the plaintiff may show that the supervisory official purposefully ignored an obvious risk or consequence that the plaintiff's constitutional rights would be violated, with the intent to cause such a violation. Finally, a plaintiff may succeed on a First or Fifth Amendment claim by showing that the supervisory official had knowledge of the subordinate's improper conduct and acquiesced in said conduct with the purpose or intent to violate the plaintiff's constitutional rights.

Similarly, to succeed on a Fourth Amendment violation claim, the plaintiff may show that the supervisory official directly caused the violation and acted objectively unreasonably in doing so. Alternatively, the plaintiff may show that the supervisory official was objectively

[211] This is the situation from *Iqbal*, in which the allegation was that Ashcroft and Mueller had knowledge of the discriminatory conduct occurring—deeming certain suspects "high interest" and subjecting them to harsher conditions of confinement—and acquiesced in the subordinates' conduct by creating this policy of investigation and incarceration and allowing the policy to continue. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1944 (2009). Iqbal likely satisfied the personal involvement prong by showing that the supervisory officials had knowledge of, and acquiesced in, the violating conduct. *See id.* What he failed to do was satisfy the requisite-mental-state prong by showing that Ashcroft and Mueller acquiesced in the violating behavior with the purpose to discriminate. *See id.* Note that this requirement is in line with *Washington v. Davis*, which explicitly states that discrimination claims will only succeed if the challenged statute was implemented "because of," not merely "in spite of," the discriminatory effect. 426 U.S. 229 (1976). Thus, while *Iqbal* did not deal with a statute, the same can be said of the policy. *See id.*

[212] U.S. CONST. amend. IV.

[213] Farmer v. Brennan, 511 U.S. 825, 836–37 (1994).

unreasonable in ignoring an obvious risk or consequence that the plaintiff's constitutional rights would be violated. Finally, the plaintiff may succeed on a Fourth Amendment claim by showing that the supervisory official had knowledge of, and acquiesced in, the subordinate's improper conduct that caused the violation, and that acquiescing in said conduct was objectively unreasonable.

Lastly, to succeed on an Eighth Amendment violation claim, the plaintiff may show that the official was reckless in directly causing the violation. Alternatively, the plaintiff may show that the supervisory official recklessly ignored an obvious risk or consequence resulting in the violation of plaintiff's rights. Finally, a plaintiff may succeed on an Eighth Amendment claim upon a showing that the supervisory official knew of, and recklessly acquiesced in, behavior that violated the plaintiff's constitutional rights.

V. CONCLUSION

In *Iqbal*, the Supreme Court stated that "the term 'supervisory liability' is a misnomer."[214] Many courts and scholars alike have interpreted this opinion to mean that supervisory liability was abolished or that supervisors are liable only when they meet the same standards that subordinates are required to meet.[215] For both practical and policy reasons, this cannot be an accurate reading of the *Iqbal* decision. To be a misnomer is to be misnamed. The term "supervisory liability," on its face, implies the assumption of liability simply by means of being a supervisor. In this regard, the term is a misnomer. Rather than being liable simply for being a high-level official, supervisors are liable only under certain circumstances.

Iqbal clarified and confirmed that one requirement for said circumstances is that a plaintiff must show that the supervisor exhibited the requisite mental state as established by the underlying constitutional violation.[216] As noted in *Iqbal*, but established quite clearly in previous Supreme Court case law, the other requirement is that the supervisor be personally involved in the deprivation of the constitutionally protected rights.

Based on several circuits' analyses of the personal involvement requirement, an appropriate uniform standard of supervisory liability includes three potential means of satisfying that prong: (1) a showing that the supervisory official directly caused the constitutional viola-

[214] *Iqbal*, 129 S. Ct. at 1949.
[215] *See, e.g.*, Nahmod, *supra* note 37.
[216] *Iqbal*, 129 S. Ct. at 1948; *see* discussion *supra* Part III.

tion firsthand, (2) a showing that the supervisory official was deliberately indifferent to the risk of the constitutional violation, or (3) a showing that the supervisory official had knowledge of the behavior causing the violation and acquiesced in that behavior. Likewise, to meet the supervisory liability standard, the satisfaction of one of the three enumerated personal involvement showings must be accompanied by the requisite mental state for the particular constitutional claim at hand.[217]

In sum, *Iqbal* was not a groundbreaking decision regarding the standard for supervisory liability. Rather, *Iqbal* merely clarified that in order to satisfy the supervisory liability standard, the supervisor's requisite mental state must be derived from the underlying constitutional claim. In addition to the mental state requirement clarified in *Iqbal*, Supreme Court case law indicates, and *Iqbal* confirmed, that there is a personal involvement requirement as well.[218] Based on the standard that this Comment sets out, a plaintiff must meet both requirements in order to succeed on a § 1983 or *Bivens* claim. With the confusion in the wake of the *Iqbal* decision, society demands clarification, and with the high stakes and pertinent policy implications of that clarification, society demands a comprehensible, uniform standard like the one put forth in this Comment.

[217] *See* discussion *supra* Part. IV.C.
[218] *See, e.g.*, Robertson v. Sichel, 127 U.S. 507 (1888).